Supreme Court, U.S.
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No. 90-1362

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

MAURICE WILSON,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

BRUCE N. CAMERON *
MILTON L. CHAPPELL
National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

Attorneys for Petitioner
* *Counsel of Record*

June 5, 1991

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ARGUMENT

I. "THICKNESS" IS NOT A CRITERIA FOR COURT REVIEW.

The Solicitor General:

1. agrees that this case presents "a difficult question of constitutional law" (Opp. brf. 8);

2. admits that Justice previously took the same position on the constitutional issues as the Petitioner does here (Opp. brf. 13 n.9); and,

3. admits that this is the type of case which normally warrants review (Opp. brf. 14).

Despite this, the Solicitor argues that this case presents the "rare instance" (Opp. brf. 8) where the normal considerations should be set aside because the damage to Mr. Wilson's religious freedom is "thin and insubstantial." (Opp. brf. 17)

Thickness and sturdiness may be criteria for being accepted into the National Football League, but they do not correspond to any known criteria for acceptance by this Court.

What the Solicitor means by this, in terms of traditional legal argument, is unclear. At one point in his brief he apparently records all of his random thoughts about whether this case is moot. (Opp. brf. 14-16) However, he concludes (rightly) that this case is not moot. (Opp. brf. 16) He seems to argue that his discarded thoughts on mootness make the case "thin."

While presenting his discarded thoughts on mootness, the Solicitor makes reference to matters outside the record which tend to make it appear that the Petitioner, Maurice Wilson, did not suffer serious adverse consequences because of the clash between the union's demands and his conscience. The suggestion is that other, subsequent proceedings taken pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000(e) *et seq.*)

protected Mr. Wilson. This apparently disqualifies the case from being "sturdy."

Whatever the precise legal meaning of the Solicitor's "thickness" argument, his obvious intent is to signal that the specific personal injuries and wrongs claimed by Maurice Wilson are not worth the Court's time.[1]

This Court takes cases to chart the course of the law and to exercise its supervisory authority over lower courts. It does not take civil cases just to fix the cuts and bruises of a particular petitioner. As a former Chief Justice has noted:

> To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved. Those [who file successful petitions] will know, therefore, that you are, in a sense, prosecuting or defending class actions; .... What the Court is interested in is the actual, practical effect of the disputed decision—its consequences for other litigants and in other situations.[2]

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[1] Mr. Wilson has a concrete interest in this case. Since the Solicitor makes assertions based on extra-record facts, the extra-record reply is that the facts and the incident which gave rise to this litigation were never the subject of any Title VII charge. Mr. Wilson was not aware of Title VII remedies and he did not contact counsel until the limitations period had long run. But even if he were aware of Title VII at the time of the events in this case, Section 19, as shown *infra*, provides protection for religious objectors that is simply not available under Title VII.

[2] Speech by the Honorable Fred M. Vinson, Chief Justice, on the "Work of the Federal Courts," before the American Bar Association, September 7, 1949, found in 69 S. Ct. V, VI.

A decision by a lower court to declare part of the nation's basic labor law unconstitutional is precisely the kind of case that this Court takes—a fact the Solicitor acknowledges. (Opp. brf. 14)

Even the litigation before the National Labor Relations Board (Board) transcended the parochial interests of Maurice Wilson. The Board's primary responsibility is to protect the *public interest*. *NLRB v. Raytheon Co.*, 398 U.S. 25, 28 (1970). Therefore, from the day the Board ruled Mr. Wilson ineligible for a religious exemption to the day the appeals court struck down Section 19, this case has been freighted with public interest.

II. THIS CASE IS IMPORTANT TO THE THOUSANDS OF EMPLOYEES WHO SHARE MAURICE WILSON'S RELIGIOUS BELIEFS.

The decision of the court below judicially eliminated the only provision of the nation's basic labor law which even purports to protect religious minorities. Wherever Mr. Wilson finds a job in the future, he is forever barred from claiming protection for his religious[3] beliefs under Section 19 (29 U.S.C. § 169).

More important to this Court's supervisory powers is the fact that hundreds of thousands of employees who hold religious

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[3] Amicus Council On Religious Freedom makes the frivolous suggestion that Mr. Wilson's beliefs are not religious. Apparently the Council has not looked at the record. The administrative law judge found Mr. Wilson's beliefs to be religious (Pet. App. 20a), the National Labor Relations Board agreed (Pet. App. 14a, n.1), as did the court below (Pet. App. 1a-2a & n.1), and the Solicitor concurs (Opp. brf. 14-15). Even the most cynical observer reading Mr. Wilson's "Statement of Christian Convictions" (R. II, Jt. exhs. 5 & 7) would conclude that his beliefs are religious. Furthermore, the Council has badly confused the law on standing when it suggests that the nature of Mr. Wilson's beliefs affects his standing. His standing, which is undisputed by the parties, comes from 29 U.S.C. § 160(f) ("[a]ny person aggrieved by a final order ... may obtain a review"). Disputes over the nature of his religious beliefs go only to the merits of the exemption case.

beliefs similar to Mr. Wilson's will also be barred from using the religious accommodation provision which Congress wrote into the National Labor Relations Act (NLRA).

While the exact number of the employees affected is not known, some conclusions about the extent of the problem are possible. The congressional debate over Section 19 mentioned several religious denominations which specifically teach their members not to support labor unions. These included the Seventh-day Adventists and certain Amish and Mennonite groups. (126 Cong. Rec. 34007 (1980) (remarks of Sen. Melcher))

The amicus brief filed by the General Conference of Seventh-day Adventists states that it has 6.6 million members, 760,000 of whom currently reside in the United States. The 1990 edition of the "Yearbook of American & Canadian Churches" 252 (Abingdon Press) shows a membership of 92,682 for the Mennonite Church and 68,040 for the Old Order Amish Church. Of course, the number of employees who, like Mr. Wilson, hold personal religious beliefs against supporting unions is unknown. From these statistics it is reasonable to assume that at least 1 million are potentially affected by the demise of Section 19.

Twenty-one states have passed Right to Work laws (pursuant to 29 U.S.C. § 164(b)) and twenty-nine have not. Of the twenty-nine states that have not passed a Right to Work law, ten have enacted state statutes which are patterned after Section 19 and which cover public employees.[4] The fate of these state statutes

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[4] *Alaska* - Alaska Stat. § 23.40.225 (Supp. 1987), Alaska Stat. § 42.40.880 (Supp. 1987); *California* - Cal. Gov't Code § 3546.3 (West 1988), Cal. Gov't Code § 3515.7 (West 1988), Cal. Gov't Code § 3502.5 (a) (West 1988); *Hawaii* - Haw. Rev. Stat. § 377-4.5 (1985), Haw. Rev. Stat. § 89-3.5 (1985); *Illinois* - Ill. Ann. Stat. ch. 48, para. 1606 § 6(g) (Smith-Hurd 1986), Ill. Ann. Stat. ch. 48, para. 1711 § 11 (Smith-Hurd 1986); *Montana* - Mont. Code Ann. § 39-31-204 (1987); *Ohio* - Ohio Rev. Code Ann. § 4117.09(C) (Anderson 1987 Supp.); *Oregon* - Or. Rev. Stat. § 243.666 (1987); *Pennsylvania* - Title 43 ch. 19 § 2215(h) (1988 CCH Public Employee Bargaining ¶ 27,417); *Washington* - Wash. Rev. Code Ann. § 28B.52.045(3) (1988), Wash. Rev. Code Ann. § 41.59.100

(other than the Washington statutes)[5] and the public employees protected by them is also caught up in the fate of this case.

Instead of this case being "thin and insubstantial," as the Solicitor suggests, it is fat with the number of religious objectors and state statutes which are riding on its fate.

III. SECTION 19 IS AN IMPORTANT PART OF THE CONGRESSIONAL SCHEME TO PROTECT RELIGIOUS FREEDOM WHICH HAS NOT BEEN ECLIPSED BY THE CIVIL RIGHTS ACT.

While the Solicitor's "thinness" argument is a muddle of extra-record facts whose legal significance is unclear, the subtle message is that this Court should allow Maurice Wilson and Section 19 to sink slowly and irretrievably under the waves because Title VII of the Civil Rights Act protects Mr. Wilson and all other religious objectors like him. This subtle message is not accurate. For at least three reasons, Section 19 has not been eclipsed by the religious discrimination provisions of Title VII.

A. The Section 19 amendment post dates the Title VII amendments.

The Solicitor's suggestion baldly ignores the legislative facts. The 1980 amendment to Section 19 at issue ***followed***, not preceded, the 1972 religion amendments to Title VII. Congress looked at what it had done in Title VII for religious objectors,[6] it looked at how the Courts were handling religious objectors

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(1988), Wash. Rev. Code Ann. § 47.64.160 (1986); *Wisconsin* - Wis. Stat. Ann. § 111.85(d) (West 1988).

[5] One Washington statute has been broadly construed by its Supreme Court to avoid the very constitutional problem presented here. *Grant v. Spellman*, 99 Wash. 2d 815, 664 P.2d 1227 (1983).

[6] 126 Cong. Rec. 2580 (1980) (remarks of Rep. Hinson).

under Title VII[7] and it decided to amend the NLRA to clarify and improve the path for religious objectors—as described next.

B. Section 19 promotes accommodation and limits litigation.

One advance for religious objectors (and advantage for the judiciary) created by Section 19 is that it forces accommodation at the point of bargaining the union security clause and does not dump the controversy in federal district court after the religious objector has been discharged. Section 19 requires each collective bargaining agreement containing a union security clause to specifically apprise religious objectors of their right to an accommodation. Section 19 provides in pertinent part, "Any employee ... [holding] conscientious objections ... shall not be required to join or financially support any labor organization ... *except* [where the accommodation is set forth in the contract]." (emphasis added)

This language, in the view of the Board, completely releases religious objectors from the obligation to pay any union fees at all unless the collective bargaining agreement specifically sets forth an accommodation for them. *Scandia Log Homes*, 258 N.L.R.B. 716, 719 (1981).

Therefore, if the employer and union do not include in their bargaining over the union security clause a provision for religious objectors, the objector pays nothing. This is a powerful tool to compel the employer and union to agree to accommodate. Title VII has no parallel provision, and no court has ever held under Title VII that a reasonable accommodation for religious objectors is that they pay nothing. In fact, one court has held just the opposite. *Yott v. North American Rockwell Corp.*, 602 F.2d 904, 906-07 (9th Cir. 1979).

Section 19 not only pressures the parties to the collective bargaining agreement to accommodate religious objectors, it

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[7] *Id.* at 2581-82 (1980) (remarks of Rep. Clausen).

forces them to deal with the specific terms of the accommodation. Unlike Title VII, Section 19 does not leave the reasonable accommodation open for litigation and dispute by the parties. The employer and the union are to include in the collective bargaining agreement the three charities from which the employee can choose to pay the union fees. (In the absence of such a designation, the religious objector gets to choose.) Section 19 provides:

> [The] employee may be required ... to pay ... to a nonreligious, nonlabor organization charitable fund ... chosen by such employee from a list of at least three such funds, designated in such contract or if the contract fails to designate such funds, then to any such fund chosen by the employee.

It was for these reasons that Representative Erlenborn promoted the 1980 amendment to Section 19 by saying, "This bill [which became Section 19] will ... hopefully, reduce the financial burden on those conscientious objectors who must go to court to enforce their rights."[8] He also said, "[a]ccommodation can be more rapidly achieved through congressional action than through costly and protracted court litigation."[9]

Section 19 also improves upon Title VII by eliminating the undue hardship controversy that is a standard defense in religious discrimination litigation under Title VII. *See, TWA v. Hardison*, 432 U.S. 63 (1977); *compare* 29 U.S.C. § 169 with 42 U.S.C. § 2000e(j). Section 19 does not provide for an undue hardship defense. Normally, the union representing the religious objector incurs no additional bargaining expense simply because the objector is in the bargaining unit. An exception to this rule occurs when the union is required to file a grievance specifically for the religious objector. Section 19 eliminates this potential

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[8] 126 Cong. Rec. 2584 (1980).

[9] *Id.*

hardship by making the objector reimburse the union for the reasonable cost of filing a grievance on his behalf. ("If such employee ... requests ... to use the grievance-arbitration procedure ... the labor organization is authorized to charge the employee for the reasonable cost ....")

From this it is clear that Section 19 is not eclipsed by Title VII. It is a decided improvement over Title VII in that it avoids the expensive and time-consuming litigation usually needed to wrestle out the accommodation and undue hardship questions.

C. Section 19 gives religious objectors notice of their rights.

Under Title VII, notices advising employees of their rights are posted only after litigation has been brought and the employer or union has either informally conceded the point or lost the point before a court. As noted above, Section 19 pressures the employer and union to specifically provide for the accommodation in the employees' contract.

The requirement that the employer and union affirmatively inform religious objectors through the collective bargaining agreement of their right to pay to a charity, or waive the right to force any payment, is an important right that does not exist under Title VII and cannot be found in any reported Title VII decision. This "inform or waive" requirement is consistent with the analogous instruction by the Supreme Court in *Chicago Teachers Union, Local 1 v. Hudson*, 475 U.S. 292, 306-07 (1986) that employers and unions must provide nonunion employees with information about their rights in relation to compulsory union fees.

D. The judiciary has historically held Title VII and the NLRA to be distinct.

The idea that Title VII could override or eclipse a portion of the NLRA is contrary to well-established precedent. The consistent pattern of the federal courts is to hold that Title VII and the NLRA provide separate and independent rights to

employees. An employee has the right to independently pursue his rights under both Title VII and the NLRA. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47-50 & n.9 (1974).

IV. THIS ISSUE WILL NOT COME BEFORE THE APPELLATE COURTS AGAIN.

The Solicitor argues that this Court should wait to review the grave constitutional issues raised by Section 19 until the issue arises again (in a presumably "fatter" case) from another court of appeals. (Opp. brf. 19) The Solicitor argues this could happen if an employer, relying on Section 19, refused to discharge a religious objector *and* the union filed a charge with the NLRB *and* the General Counsel of the NLRB issued a complaint *and* the employer lost *and* the employer (or employee) filed an appeal *and* the appeals court made a decision *and* a petition was brought before this Court.

The short answer to all of these "*ands*" is, "Why would an employer refuse to discharge the objector in the first place?" With the Board's precedent clear, and with the adverse decision of the court below, an employer would have no motive to spend money on a fight that he knew he would lose before the Board. Furthermore, if the Board sought to protect its decision by refusing to issue a complaint against the employer, that decision is completely unreviewable. (See discussion in Pet. at 7.)

The only logical way in which this case could arise again would be based on an employee's unfair labor practice charge. The Board's decision in this case stands as a barrier to issuing complaints for religious objectors like Wilson. *E & L Transport*, No. 7-CA-28939 (1989) (decision reproduced in the addendum).

As a practical matter, this is the first and last time that the question of the constitutionality of Section 19 will come before this Court.

V. THE SOLICITOR DOES NOT ADDRESS THE ISSUE OF HOW TO APPROPRIATELY REMEDY THE CONSTITUTIONAL DEFECT IN SECTION 19.

The Solicitor notes that one of the issues before this Court is "[w]hether, if Section 19 were found to be unconstitutional, the provision should be nullified, rather than extended to all employees having a religious objection to joining or supporting unions." (Opp. brf. 1) He does not address that question or suggest how the congressional mandate can be salvaged. Petitioner and Amici argue that the traditional remedy for salvaging unconstitutional, underinclusive statutes is extension, not nullification. (Pet. 18-20) If Petitioner is correct, this Court can save Section 19 and continue the protection for those religious minorities that Congress unquestionably sought to protect.

CONCLUSION

This case is the "last train out of Dodge" for Section 19. If this Court does not review this case now, it is highly improbable that the validity of Section 19 will ever come before this Court. Properly construed, Section 19 is a powerful congressional tool for protecting the religious beliefs of employees. If the decision below stands, this powerful congressional tool will be lost to religious objectors.

Respectfully submitted,

BRUCE N. CAMERON*
MILTON L. CHAPPELL
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

Attorneys for Petitioner
*Counsel of Record

June 5, 1991

ADDENDUM

[Logo omitted in printing]

United States Government

NATIONAL LABOR RELATIONS BOARD

Region 7

477 Michigan Avenue - Room 300

Detroit, MI 48226-2569

May 11, 1989

Linda Douglass
3369 Will Carleton Road
Flat Rock, MI 48134

Re: E & L Transport Co.
Case No. 7-CA-28939

Dear Ms. Douglass:

The above-captioned case, charging violations under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it appears that further proceedings are not warranted at this time. I am, therefore, refusing to issue Complaint in this matter. A written summary report of the basis for my conclusions is attached hereto.

Please refer to enclosed Form NLRB-4938 as to the procedure and deadline for filing an appeal of my dismissal action.

Very truly yours,

/s/

Bernard Gottfried
Regional Director

RK/eas

Enclosures: Form NLRB-4767
"Notice of Appeal"

Form NLRB-4938
"Procedure for Filing an Appeal"

(SEE ATTACHED SHEET)

RE: E & L Transport Co.
Case No. 7-CA-28939

SUMMARY REPORT

The charge in the above captioned matter alleged that the Employer violated Section 8(a)(2) and (3) of the National Labor Relations Act (the Act) by its refusal to honor the request of Linda Douglass, the Charging Party, pursuant to Section 19 of the Act, that she not be required to pay dues to Local 299, Teamsters Union.

The investigation established that commencing in June, 1988, the Charging Party requested of the Employer that she be allowed to withdraw her membership in the Teamsters, Local 299 because of her religious objections to the joining or funding of labor organizations. The Employer did not honor her request and instead continued to deduct the Union dues and remit them to the Union. The Charging Party claimed that her membership in the Christian Auto Workers (CAW) formed the basis for her Section 19 claim. The investigation established that the CAW was an organization of relatively recent origin, beginning in approximately 1977. Furthermore, at the time that the Charging Party made her Section 19 request to the Employer, the Charging Party was the only member of the CAW and was the first employee to claim membership in the CAW as a basis for the Section 19 claim. The investigation established that the CAW acts more as a support framework for people who object to union membership but are members of religions which do not hold as a basic tenet that their membership cannot join or fund labor organization or for employees who have personally held religious beliefs, irrespective of any membership in an organized religion, that they cannot join or fund labor organizations. Based on such, it cannot be established that the CAW is a bona fide "religion, body, or sect" within the meaning of Section 19 of the Act such that the membership in it would lead to a viable claim under Section 19. (Grand Rapids City Coach Lines 293 NLRB No. 62 (1989).

An additional issue is whether a personally held religious belief irrespective of membership in a religion, body or sect that one should not join or fund a labor organization can be used to invoke Section 19. The language of Section 19 states that to invoke the section, the employee must be a member of a "religion, body or sect". The language of the statute focuses on the membership of the employee as a prerequisite for the application of the provisions of Section 19. Therefore, no matter how sincerely felt, personally held convictions that one cannot join or fund labor organizations where those convictions do not arise out of the employee's membership in a legitimate Section 19 "religion, body or sect" cannot be used as a basis for a Section 19 claim. Ibid

Based on the above, the charge in the instant matter is dismissed.

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UNITED STATES GOVERNMENT

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

October 4, 1989

Re: E & L Transport Co.
Case No. 7-CA-28939

Ms. Linda Douglas
3359 Will Carleton Road
Flat Rock, Michigan 48134

Dear Ms. Douglas:

Your appeal from the Regional Director's refusal to issue complaint in the above-captioned case has been carefully considered.

The appeal is denied substantially for the reasons set forth in the Summary Report attached to the Regional Director's letter of May 11, 1989.

Very truly yours,

Joseph E. DeSio
Acting General Counsel

By /s/
Mary M. Shanklin, Director
Office of Appeals

cc: Director, Region 7
Frederick Damm, Esq., 400 Renaissance Center, Suite 2300, Detroit, Michigan 48243
E & L Transport Co., 35005 Michigan Avenue, Wayne, Michigan 48184
E & L Transport Co., 2100 Hayden Drive, Woodhaven, Michigan 48183
Jerome Coleman, Esq., 27404 Drake Road, Suite 200, Farmington Hills, Michigan 48331
Local 299, IBT, 2741 Trumbull Avenue, Detroit, Michigan 48216